

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

JOE D'AMBROSIO,
c/o David E. Mills
1300 W. 9th St. #636
Cleveland, OH 44113,

Plaintiff,

v.

**CARMEN MARINO, in his official capacity
as assistant prosecutor for Cuyahoga
County, WILLIAM MASON, in his official
capacity as assistant prosecutor and
prosecutor for Cuyahoga County,
ELIZABETH BALRAJ, in her official
capacity as Cuyahoga County Coroner and
in her individual capacity, LEO ALLEN, in
his official capacity as Cleveland police
detective and in his individual capacity, THE
COUNTY OF CUYAHOGA, and THE CITY
OF CLEVELAND,**

Defendants.

Case No. 1:11-cv-933

Judge Polster

Magistrate Judge White

JURY TRIAL DEMANDED

SECOND AMENDED COMPLAINT AND JURY DEMAND

INTRODUCTION

1. This civil action seeks money damages for the extraordinary injuries and losses suffered by Plaintiff Joe D'Ambrosio, a former Army Sergeant with no criminal record who was wrongfully convicted of aggravated murder, sentenced to death, nearly executed, and incarcerated on death row for approximately 21 years before federal and state courts concluded

that his constitutional rights had been violated and that he could never be found guilty of the crime. Ultimately the courts invalidated his conviction and effectuated his release from incarceration on March 5, 2010. At various times since 1988, Defendants, individually and collectively, wrongfully concealed exculpatory evidence in violation of D'Ambrosio's rights under the U.S. Constitution and the laws of the State of Ohio.

JURISDICTION

2. This action arises under the laws of the United States, and jurisdiction is conferred on this Court under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (civil rights). Supplemental jurisdiction of the Court over the claims arising under state law is invoked under 28 U.S.C. § 1367 (supplemental jurisdiction).

VENUE

3. Venue in the Northern District of Ohio is proper under 28 U.S.C. § 1391(b), because it is the district in which many if not all of the defendants reside, and because a substantial part of the events or omissions giving rise to the claims occurred within the Northern District of Ohio.

JURY DEMAND

4. D'Ambrosio requests a jury trial on the issues and claims set forth in this Complaint.

THE PARTIES

5. Plaintiff **Joe D'Ambrosio** is an adult residing in Cuyahoga County, within the Northern District of Ohio.

6. Defendant **Carmen Marino** was, at times before 1999 pertinent to this Complaint, an Assistant Prosecuting Attorney at the Office of the Prosecuting Attorney for Cuyahoga County, which is located within the Northern District of Ohio. Defendant Marino is being sued in his official capacity because at times relevant to this Complaint, he was a final policymaker responsible for his own actions and the actions of certain subordinate employees of the Office of the Prosecuting Attorney for Cuyahoga County, and was acting in an administrative capacity with respect to certain matters alleged in this Complaint.

7. Defendant **William ("Bill") Mason** was, at times before 1999 pertinent to this Complaint, an Assistant Prosecuting Attorney at the Office of the Prosecuting Attorney for Cuyahoga County. Since 1999, Mason is the Prosecutor for Cuyahoga County. Defendant Mason is being sued in his official capacity because at times relevant to this Complaint, he was a final policymaker responsible for his own actions and the actions of his subordinate employees of the Office of the Prosecuting Attorney for Cuyahoga County, and was acting in an administrative capacity with respect to certain matters alleged in this Complaint.

8. In other parts of this Complaint, Marino and Mason are collectively referred to as **"the Prosecutors."**

9. At all times relevant to this Complaint, Defendants Marino, Mason, and the Prosecutor's Office acted under color of state law.

10. Defendant **Elizabeth K. Balraj** was, at times pertinent to this Complaint, the elected Coroner for Cuyahoga County. She is being sued in her individual and official capacities.

11. Defendant **County of Cuyahoga** is the government entity of Cuyahoga County, Ohio, and is subject to governmental liability in connection with claims asserted in this Complaint and is located within the Northern District of Ohio.

12. Defendant **Leo Allen** was, at times pertinent to this Complaint, a police officer and/or detective of the City of Cleveland. He is being sued in his individual and official capacity and is located within the Northern District of Ohio.

13. Defendant **City of Cleveland** is a municipality in the state of Ohio, and is subject to governmental liability in connection with claims asserted in this Complaint and is located within the Northern District of Ohio.

14. In other parts of this Complaint, Allen and the City of Cleveland are referred to as **“the Police.”**

FACTS

Overview

15. This saga began in 1988 when Paul “Stoney” Lewis raped Tony Klann’s roommate. Klann was set to testify against Lewis, but Lewis had the opportunity to eliminate Klann. When Klann was found dead with a slashed throat and multiple stab wounds, Lewis led Detective Allen to D’Ambrosio—the new guy in town who just returned from serving as an Army Sergeant and who had no criminal record. As discussed in more detail below, the

Defendants never looked back once Lewis led them to D'Ambrosio, and Lewis's associate, Eddie Espinoza, claimed to innocently have watched as D'Ambrosio committed the murder. Shockingly, the Defendants thereafter withheld from D'Ambrosio and his counsel all of the evidence pointing to Lewis and Espinoza as the true killers. That evidence finally surfaced in habeas proceedings in this Court after D'Ambrosio had spent approximately 21 years on death row. In 2010, D'Ambrosio was freed from confinement.

16. Many of the relevant facts are also discussed in detail in the U.S. District Court's opinions issued during D'Ambrosio's habeas case, *D'Ambrosio v. Bagley*, No. 1:00-CV-2521, which ultimately resulted in this Court granting D'Ambrosio an unconditional writ of habeas corpus, ordering that his conviction be invalidated, and concluding that he can never be tried and found guilty for Klann's murder. Those decisions were attached to the original Complaint and are expressly incorporated as though fully set forth here. They are as follows:

- Opinion and Order of March 24, 2006 (the "2006 Brady Op.").
Concluding that D'Ambrosio's *Brady* rights were violated and granting a conditional writ of habeas corpus.
- Opinion and Order of April 27, 2009 (the "2009 Unconditional Writ Op.").
Concluding that further misconduct related to D'Ambrosio's prosecution violated the conditional writ and granting an unconditional writ of habeas corpus, effective May 12, 2009.
- Opinion and Order of March 3, 2010 (the "2010 Reprosecution Bar Op.").
Concluding that D'Ambrosio can never be tried and found guilty of the Klann murder.

**Prosecutor Marino subpoenas Tony Klann to
testify against Stoney Lewis for raping Klann's
roommate**

17. In May 1988, Tony Klann lived with a legally-blind man, Chris Longenecker, at 1907 East 120th Street in Little Italy. (Pros. File 193–201, 218, 223; Clev. Pol. 34.)¹ Paul “Stoney” Lewis rented the apartment downstairs. (Pros. File 191.) On May 11, 1988, Lewis raped Longenecker, forcibly sodomizing him at Lewis’s apartment. (*Id.* 244.) Klann heard noises and entered Lewis’s apartment shortly after the rape occurred. (*Id.* 245) Klann and Longenecker left together. (*Id.* 245.) Longenecker was crying and told Klann that “something had just happened.” Longenecker suspected that Klann understood that the “something” was a reference to the just-concluded rape. Longenecker reported the rape to police and later received treatment at Mt. Sinai Hospital, where a rape protocol was administered. (Pros. File 228–38.) *See generally*, 2006 *Brady* Op. at 11–12.

18. Two days after the rape, Paul Lewis was arrested. (Pros. File 190, 246.) He was indicted for sexual assault with an aggravated-felony specification (based on an earlier aggravated burglary). (*Id.* 197.) Lewis remained in jail for nearly three months. (*Id.* 190.) The case was assigned to prosecutor Carmen Marino. (*Id.* 190, 196.) Marino subpoenaed as a prosecution trial witness Longenecker’s roommate, Tony Klann (referred to as “Tony LNU” or “Last Name Unknown”). (*Id.* 193, 195, 196, 219–20.) Lewis’s defense team also subpoenaed “Anthony Klann.” (*Id.*)

¹ “Pros. File” refers to the Cuyahoga County Prosecutor’s Files submitted as Exhibit A to D’Ambrosio’s April 28, 2003 Memorandum in Support of Summary Judgment (“SJ Mem.”) in his habeas case in this Court, *D’Ambrosio v. Bagley*, No. 1:00-cv-2521 (ECF No. 117.) “Clev. Pol.” refers to the Cleveland Police Files submitted as Exhibit B to that Memorandum.

Klann is killed after Paul Lewis is released

19. Trial in Lewis's rape case was set for August 1, 1988. But Longenecker (legally blind) misread the date on the notice to appear for trial and failed to appear. (Longenecker Aff. ¶ 6.) The rape case was dismissed without prejudice. Longenecker later left his new address and phone number with the prosecutor, but did not hear from the prosecutor again. (Pros. File 191, 209.) Thus, in September 1988, Lewis was free and had the motive and opportunity to eliminate the witness, Tony Klann, who lived right upstairs. (*Id.* 239, 243.)

20. One night that September, Klann and Lewis were at a Cleveland Heights bar called Coconut Joe's. Three other men—Eddie Espinoza, Mike Keenan, and Joe D'Ambrosio—also arrived at the bar for "Tequila Night." 2006 *Brady* Op. at 4, 13. The manager at the bar later explained that "Tequila Night" was always on a Thursday—and this particular night was Thursday, September 22, 1988. *Id.* at 13. (Lewis and his associates would later claim that these events occurred on Friday the 23rd.) The men eventually left Coconut Joe's around 1:30 a.m. D'Ambrosio and Espinoza went to D'Ambrosio's apartment. *Id.* at 4. Keenan soon arrived in his truck, saying he wanted to look for Lewis because Lewis had allegedly stolen drugs from him. *Id.* D'Ambrosio and Espinoza joined Keenan as he looked for Lewis in Little Italy at approximately 3:00 a.m. *Id.* (This was part of a sequence of continuous events from Thursday night/Friday morning.) While driving, they saw Tony Klann walking in the rain and picked him up. *Id.* at 5. In the search for Lewis, they ended up at apartments of Lewis's friends, Adam Flanik and James "Lightfoot" Russell. Keenan and Espinoza did not find Lewis that night, and they dropped D'Ambrosio off at his apartment. (Trial Tr. 322.)

21. The next night and early morning (Friday/Saturday) involved suspicious activity in Lewis's and Klann's building. At about 4:00 a.m. on Saturday, September 24, 1988, a person

in the building heard loud noises coming from Lewis's apartment. 2006 *Brady* Op. at 53. Another neighbor heard someone say, "Let's dump the body in the basement." *Id.* Later that day, a jogger discovered Klann's lifeless body in Doan Creek, near Martin Luther King Boulevard. (Clev. Pol. 86–87.)

22. Detectives Mel Goldstein and Ernest Hayes arrived at the scene and found Klann's body face-down in about two feet of water. (*Id.* 86–88.) Klann had on a tee shirt, pants, and socks, but no shoes or undershorts. (Cuyahoga County Coroner's File ("Cor. File") at 11 (Ex. E to SJ Mem.)) His throat was slashed and he had multiple stab wounds. (Clev. Pol 86–88.) There was no blood or signs of a struggle by the creek. (Goldstein Aff. ¶¶ 4–7; Hayes Aff. ¶¶ 4–7.) The detectives concluded that Klann had been killed elsewhere and dumped in the creek. (Goldstein Aff. ¶¶ 8–9; Hayes Aff. ¶¶ 10–11.) The coroner noted that Klann (who was unidentified at the time), had cuts on his hands and a tattoo of a cross on his right forearm. (Cor. File 24, 55.)

**Lewis knew Klann "had his hands cut" and leads
police to D'Ambrosio**

23. Monday morning, Lewis, refusing to reveal his identity, called the police department, asking whether the victim "had his hands cut." (Clev. Pol. 71.) That information was not publicly known. Lewis asked for the location of the morgue, and the police correctly assumed he (still anonymous) would show up there. (*Id.* 51, 71.) The police notified Detective Leo Allen, who was already there working on another case. (*Id.* 51.) Lewis indeed arrived at the morgue with his friend, James "Lightfoot" Russell. (*Id.* 51, 59.) Lewis identified the victim as Klann. (*Id.* 51–52.)

24. Lewis told police that everyone was at Coconut Joe's on Friday night (not Thursday). (*Id.* 51.) He further stated that Espinoza, Keenan, and D'Ambrosio were there arguing with Klann. (*Id.*) He then told police that his friends, Lightfoot and Flanik, saw these three men with Klann on Friday night/Saturday morning. Lewis told police that Lightfoot said the three came by his apartment armed and looking for Lewis. Lewis also told the police that Flanik told him he saw D'Ambrosio in Keenan's truck early that Saturday morning with a knife to Klann's throat.

25. Lewis then led the detectives to D'Ambrosio's apartment, where, he said, Espinoza had also been staying. (*Id.* 52.) Police arrested D'Ambrosio and Espinoza. (*Id.*) They seized hunting knives, a baseball bat, and other physical evidence. (*Id.* 52–53.) Flanik and Lightfoot confirmed Lewis's story to the police, noting in particular that the events occurred Friday night/Saturday morning and that D'Ambrosio had a knife with him. (*Id.* 45–46.)

**Espinoza claims to have innocently watched as
D'Ambrosio stabbed Klann at the creek**

26. Espinoza confirmed Lewis's story, and he told the police that he witnessed the murder. (*Id.* 55–56.) Espinoza first relayed the following events: They were at Coconut Joe's; they left after an incident with the bouncer; later, Espinoza, Keenan, and D'Ambrosio picked up Tony Klann who was walking in the rain; and they stopped by Flanik's and Lightfoot's because Keenan was looking for Lewis, believing that Lewis had stolen drugs from him. (Sept. 26, 1988 Espinoza Statement (Ex. I to SJ Mem.)) But, as did the others associated with Lewis, Espinoza said that these events occurred the night before Klann's body was found—Friday night, not Thursday. Espinoza then claimed that Keenan drove to Doan Creek where he slashed Klann's throat and threw him into the creek because Klann would not say where Lewis was. Espinoza further claimed that D'Ambrosio then grabbed the knife from Keenan, jumped over the creek

ledge into the creek (six feet below the ledge), chased Klann down, and stabbed him in the chest to finish him off. (Trial Tr. for CR-232189-B, at 225–27.) Keenan, Espinoza, and D’Ambrosio were charged with aggravated murder, aggravated felony murder, kidnapping, and aggravated burglary.

**When Longenecker hears of the murder, he
immediately calls the police to suggest the
obvious link to Lewis, but nobody follows up.**

27. The day after hearing about Klann’s murder, Longenecker (who had left the area for fear of Lewis), called the Cleveland Police Department and alerted it that Klann’s murder was related to Klann’s status as a witness against Lewis in the rape case. (Longenecker Aff. ¶ 8; Pros. File 191; *see also* 2006 Brady Op. at 11.) The police never followed up. (Longenecker Aff. ¶ 8.) Later, Defendant Marino even belittled co-defendant Keenan’s attorney for suggesting the same connection between the cases. 2006 Brady Op. at 12.

28. The police also obtained a tape-recorded statement from Angelo Crimi, who was living with Klann around the time of the murder and had information that others were responsible for the murder. (Clev. Pol. 34, 36, 122.) That tape has disappeared, and Crimi is deceased. 2006 *Brady* Op. at 49.

29. The police never pursued Lewis as a suspect in the Klann murder. With Klann dead, Lewis’s rape case was “no-billed” and dropped. (No Bill, Crim. Case 231216.)

30. None of this information about Lewis—*e.g.*, his motive and opportunity to kill Klann, that someone at his building that Saturday morning said “Let’s dump the body,” his knowledge of Klann’s injuries, etc.—was revealed during D’Ambrosio’s trial. Nor was significant additional exculpatory evidence (discussed further below).

**Defendants withhold exculpatory evidence and
rely on Lewis and Espinoza to convict
D'Ambrosio and score a victory in the case**

31. At trial, Lewis and his associates persisted in their story that the Thursday night/Friday morning events—e.g., drinking at Coconut Joe's, the three defendants with Klann visiting Flanik and Lightfoot, etc.—occurred Friday night/Saturday morning. They also claimed that D'Ambrosio had a knife with him. All that remained was for Espinoza—the State's sole “eyewitness” to the murder—to take these events to the next scene. He testified that this continuous series of events Friday night/Saturday morning culminated with him innocently looking on as Keenan and D'Ambrosio committed the murder at the creek. Cuyahoga County Coroner, Elizabeth Balraj, provided “scientific” testimony to back the story, even though records in her possession that were not provided to D'Ambrosio's counsel contradicted her conclusions.

32. D'Ambrosio testified in his own defense, verifying that they were all at Coconut Joe's, that they later picked up Klann in Keenan's truck, and that they stopped by Flanik's and Lightfoot's as Keenan looked for Lewis. But D'Ambrosio explained that this all occurred on Thursday night/Friday morning. He also testified that he did not have any weapons with him. He further testified that Friday night he was at his apartment. (Trial Tr. 343, 351–54.)

33. The trial turned on D'Ambrosio's testimony versus Espinoza's. The three-judge panel believed Espinoza's story, convicted D'Ambrosio, and sentenced him to death. The presiding Judge later wrote to the parole board on behalf of Espinoza, stating that “without his testimony, convictions would have been difficult if not impossible.” (Pros. File 172.) Accordingly, in 1989, D'Ambrosio was sent to death row, where he would remain for the next 20 years.

34. Unaware that the Defendants withheld evidence of D'Ambrosio's innocence, the Ohio courts denied D'Ambrosio's state appeals and requests for post-conviction relief.

**The U.S District Court concludes that the State
violated *Brady* and grants a conditional writ of
habeas corpus**

35. D'Ambrosio filed a petition for a writ of habeas corpus in this Court, contending that the prosecution's failure to disclose exculpatory evidence violated his rights under *Brady v. Maryland*. This Court concluded that D'Ambrosio's trial attorney, Ralph DeFranco, had not received the following exculpatory evidence: information about the Lewis rape case; that police determined that Lewis was the anonymous caller about the Klann murder and that he revealed details about the body (*e.g.*, cut hands) that had not been made public; that an attorney had called the police asserting that he was representing Lewis in connection with the murder investigation; a report referring to the tape recording of Angelo Crimi implicating others in the murder; that police dispatch logs showed that a disturbance occurred at Coconut Joe's at 1:30 a.m. Friday morning (not Saturday); that Linda DeBlasis (now Hudak) stated to police that she had seen Klann alive on Friday evening, 24 hours after the events at Coconut Joe's; and that a police statement noted that a witness in Lewis's apartment building heard someone say "let's dump the body" on Friday night/Saturday morning. 2006 *Brady* Op. at 14–15.

36. This Court further noted DeFranco's conclusions regarding this evidence and its relationship to Espinoza's testimony: "DeFranco pointed out, moreover, that all evidence indicating that Klann was murdered somewhere other than Doan's Creek would have had substantial impeachment value when cross-examining Espinoza, the state's only eyewitness to the murder." *Id.* at 15.

37. In light of the withheld evidence that suggested D'Ambrosio's innocence, this Court granted D'Ambrosio a conditional writ of habeas corpus. The Court noted that the State's case at trial turned on Espinoza's testimony: "Critically, the only witness to all of these events, including the actual murder, was Espinoza, who received substantial benefits in return for his testimony." *Id.* at 6. "In essence," the Court explained, "the factfinder was charged with either believing Espinoza's or D'Ambrosio's version of the events leading up to Klann's murder." *Id.* at 42. This Court went into explicit detail about how the withheld exculpatory evidence would have altered the entire trial.

38. For example, the Court noted that the prosecution did not reveal that Detectives Hayes and Goldstein, upon arriving at the creek, surmised that Klann had been killed elsewhere and was dumped in the creek (among other things, there was no blood or signs of a struggle at the creek). This Court found "that the defense undoubtedly could have used this evidence to impeach Espinoza's testimony during trial." *Id.* at 44. The Court added that "there is a serious conflict in the evidence with respect to Espinoza's testimony regarding the timing of the murder and there is other evidence which would support a defense contention that the murder occurred elsewhere." *Id.*

39. The Court also found that the undisclosed police report referencing the Angelo Crimi cassette tape would impeach Espinoza.

40. This Court reached similar conclusions regarding the withheld trace-evidence report from the coroner's office, which revealed that Klann was not wearing shoes or undershorts when discovered. D'Ambrosio contended that this information would have enabled the defense team to impeach Espinoza's claim that the co-defendants took Klann to Doan Creek to kill him

after finding him walking along the road; the lack of shoes and undershorts indicates that he was killed in a more-familiar location (e.g., at Lewis's apartment building). This Court agreed:

[T]his evidence when taken in conjunction with the conclusions of Hayes and Goldstein, and the witness statements [by Lewis's neighbors that there was pounding and yelling Friday morning around 4:10 a.m. and that other neighbors heard someone say 'Let's dump the body in the basement'] would have provided the defense with powerful grounds upon which to refute Espinoza's version of events.

Id. at 50 (emphasis added).

41. This Court further explained that the withheld police report containing Linda Hudak's statement that she saw Klann alive on Friday night would also undercut Espinoza: "[T]he defense could have used Hudak's statement that she saw Klann alive more than twenty-four hours after the altercation at the bar to impeach E[s]pinoza's testimony." *Id.* at 54.

42. Throughout its opinion, this Court recognized that Espinoza's testimony was crucial to the entire prosecution: "All these items undercut Espinoza's testimony about how and where Klann's murder occurred and, therefore, could have been used to impeach it and, ultimately, to *undercut the state's whole theory of the case.*" *Id.* at 60 (emphasis added).

43. The Court also recognized that Lewis and Espinoza could have been the real killers: "D'Ambrosio could have chosen to assert that Lewis, in an attempt to silence Klann about the Longenecker rape, either killed him or induced Espinoza or others to kill him" and that Lewis "directed police to D'Ambrosio to deflect attention from himself." *Id.* at 58.

44. The Court also noted that four witnesses testified at the evidentiary hearing that they were with D'Ambrosio at his apartment on the Friday night at issue—consistent with D'Ambrosio's testimony at trial. 2006 Brady Op. at 16.

45. The Court was clear that D'Ambrosio was found guilty only because the exculpatory evidence was concealed: "[T]he Court is convinced that, but for the prosecution's withholding of exculpatory evidence, no reasonable factfinder would have found him guilty of aggravated murder." *Id.* at 35.

46. Accordingly, the Court granted D'Ambrosio a conditional writ of habeas corpus. It ordered the State to either retry D'Ambrosio within 180 days or set aside his convictions and sentence. *Id.* The 180-day deadline was stayed pending appeal. On June 5, 2008, the Sixth Circuit affirmed. *D'Ambrosio v. Bagley*, 527 F.3d 489 (6th Cir. 2008). On September 11, 2008, the 180-day period began; the deadline for retrial was March 10, 2009.

**The State continues to withhold exculpatory
evidence, leading this Court to grant the
unconditional writ**

47. Cognizant of the March 10, 2009 deadline, the state trial court set trial for March 2, 2009. By this time, the State had been under an order of this Court for the past three years that required the State to provide the defense with the State's complete and unredacted case file. With trial approaching, however, the State furnished D'Ambrosio with additional discovery, including a never-before-disclosed tissue sample taken from Klann and a lab report regarding the testing of soil samples taken from Doan Creek. *D'Ambrosio v. Bagley*, No. 00-CV-2521 slip op. at 7 (N.D. Ohio Apr. 27, 2009) (the "2009 Unconditional Writ Op.") (ECF No. 243). Then, on February 20, 2009, the State filed a notice that D'Ambrosio's counsel had "actual possession or actual knowledge" of all discoverable materials. *Id.* Later that day, however, an attorney for the State disclosed that four envelopes were still in the State's possession at the Scientific Investigation Unit (SIU) lab. *Id.* at 8. These envelopes contained two soil samples, one latent boot print, and blood samples taken from D'Ambrosio's apartment. *Id.* As a sanction to the

State, the trial court continued the trial date to May 4, 2009, to allow for forensic testing of this evidence. *Id.* at 11. This set the trial date outside the 180-deadline (March 10), and the State sought relief in this Court for an extension of the 180-day period. D'Ambrosio opposed that effort, contending that the State's misconduct and discovery violations caused it to violate the 180-day deadline; that this required a grant of an unconditional writ of habeas corpus; and that the circumstances militated in favor of not permitting reprosecution.

48. On Monday, April 27, 2009, this Court issued an opinion explaining that the unconditional writ would issue, effective May 12, 2009, based on the State's failure to comply with the 180-day deadline. Unconditional Writ Op. at 55. As the Court explained, "It is unquestionably the State's failure to timely comply with its discovery obligations that delayed D'Ambrosio retrial proceedings beyond March 10, 2009." *Id.* at 43. The Court highlighted the State's "inexcusable, 20-year delay in producing four highly relevant evidence envelopes, histological samples from the victim, and a lab report that is directly supportive of D'Ambrosio's theory of how the murder occurred" *Id.* The Court further noted that this theory "is directly at odds with the testimony of the State's key witness, Espinoza; evidence supporting it would, thus, provide fodder to undercut the credibility of the entirety of Espinoza's testimony." *Id.* at 21 n.13.

49. The Court also stated that it "cannot ignore the State's willingness to change its legal posture based on the strategic benefits of doing so," in particular, "plead[ing] for mercy in the state court proceedings" to avoid dismissal of the case, yet arguing to this Court that it was "the allegedly biased state court judge who made compliance with this Court's order impossible. . . ." *Id.* at 28. In granting the unconditional writ, the district court summarized its conclusions as follows:

The fact that the State did not respond to multiple discovery requests; produced material, relevant items of discovery on the eve of trial; and then sought to interfere with the orderly progress of the trial through gamesmanship all counsel against a finding that the State engaged in a good-faith effort to substantially comply with this Court's mandate.

Id. at 46. In addition to granting the writ, the Court ordered expungement of the records of D'Ambrosio's convictions and sentences. *Id.* at 47.

50. In light of the State's failure to retry D'Ambrosio within the time period this Court required, D'Ambrosio requested that the Court not permit the State to re prosecute him. *Id.* at 47. This Court recognized that, under *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006), it has the authority to bar re prosecution in "extraordinary circumstances, such as when 'the state inexcusably, repeatedly, or otherwise abusively fails to act within the prescribed time period or if the state's delay is likely to prejudice the petitioner's ability to mount a defense at trial.'" Unconditional Writ Op. at 48 (quoting *Satterlee*, 453 F.3d 362). The Court ultimately concluded that the circumstances "[e]ll short" of those that call for a re prosecution bar. *Id.* at 53. In particular, the Court concluded that "D'Ambrosio cannot demonstrate material prejudice from the additional two-month delay" arising from the State's failure to comply with the 180-day deadline. *Id.* at 54.

51. The Court also granted D'Ambrosio a Certificate of Appealability, noting that reasonable jurists could disagree with this Court's decision to allow re prosecution. *D'Ambrosio v. Bagley*, No. 00-CV-2521, slip op. at 6 (N.D. Ohio June 9, 2009) (ECF No. 250).

52. Meanwhile, D'Ambrosio was re-arraigned in state court on the original indictment. Trial was initially scheduled for Monday, August 10, 2009. In June 2009, D'Ambrosio's counsel learned that Espinoza had died in Chicago on Sunday April 26, 2009—

before this Court issued its Unconditional Writ Opinion and well before the effective date of the unconditional writ (May 12, 2009). On Friday, July 24, 2009, the State filed a notice with the trial court that it intended to introduce Espinoza's prior testimony at the retrial. That same day, D'Ambrosio moved to exclude that prior testimony. D'Ambrosio contended that introduction of the testimony would violate the Confrontation Clause because there was no opportunity to cross examine Espinoza with the exculpatory *Brady* evidence. D'Ambrosio further noted that the prior testimony was inadmissible because it, along with D'Ambrosio's conviction, had been expunged. The state trial court agreed with both reasons and ordered Espinoza's prior testimony inadmissible at any retrial. *State v. D'Ambrosio*, No. CR-88-232189-B, slip op. (Ohio Ct. C.P. Aug. 11, 2009) (incorporated here by reference).

53. While the question of Espinoza's prior testimony was pending, D'Ambrosio also moved in state court to suppress evidence arising from his initial arrest and the search of his apartment in September 1988. The court concluded that this arrest and search violated the Fourth Amendment, and it ordered that all evidence arising from those unlawful acts would be excluded at any retrial. *State v. D'Ambrosio*, No. CR-88-232189-B, slip op. (Ohio Ct. C.P. Aug. 11, 2009). The State did not appeal this decision.

**The State's continued misconduct and
Espinoza's death leads this Court to conclude
that D'Ambrosio can never be found guilty for
the crime, so the Court bars any retrial**

54. Because the State's failure to comply with the conditional-writ deadline meant that D'Ambrosio would no longer be able to confront Espinoza at any trial, D'Ambrosio sought to have this Court modify its previous order, via Rule 60(b), to bar any retrial.

55. The U.S. District Court ordered full briefing, conducted a hearing, and issued an order on November 17, 2009, certifying that it was inclined to grant the 60(b) motion and bar reprosecution. (R. 263: Nov. 17, 2009 Order.) Under procedures established in *First National Bank of Salem v. Hirsch*, 535 F.2d 343 (6th Cir. 1976), the Sixth Circuit then remanded the case to this Court so that it would have jurisdiction to enter its order. Case No. 09-3603 (R. 266-1: Order of Nov. 25, 2009).

56. On March 3, 2010, the Court vacated that portion of its prior order declining to bar reprosecution, and it issued an order imposing the bar. 2010 Reprosecution Bar Op., 688 F. Supp. 2d 709, 2010 U.S. Dist. LEXIS 19860 (N.D. Ohio March 3, 2010).

57. The Court stated that the “jurisdictional question is in some ways a simple one.” *Id.* at *32. The Court explained: “The Sixth Circuit has said that a district court may enter an order barring reprosecution when a state fails to comply with the terms of a conditional writ of habeas corpus, and no Sixth Circuit or Supreme Court case states otherwise.” *Id.* at *32–33 (citation omitted). “[T]his case,” the court continued, “is [a] straightforward matter of first principles: this Court issued an order with which the State failed to comply. It would be a peculiar rule if this Court lacked jurisdiction to consider the effect of that noncompliance.” *Id.* at *33.

58. The Court then discussed the State’s egregious conduct during the 20 years that it held D’Ambrosio on death row and its failure to reveal that “the critical State’s witness—the man around whom the entire theory of the State’s case revolved—is no longer available for trial” *Id.* at *55. The court’s conclusion on this point was also simple: “To fail to bar retrial in such extraordinary circumstances surely would fail to serve the interests of justice. Indeed it would pervert those interests.” *Id.* The court also noted that it had declined to bar

reprosecution in other cases (and in its earlier decision in this case), but explained that the decision here was no longer difficult: “While some cases present difficult questions as to whether *Satterlee*’s ‘extraordinary circumstances’ exist, . . . in light of Espinoza’s death, this case does not.” *Id.* at *66 (citing *Girts v. Yanai*, No. 02-0264, 2008 U.S. Dist. LEXIS 108844 (N.D. Ohio Nov. 5, 2008)). The court did not mince words: “That the State’s inequitable conduct led to material prejudice against D’Ambrosio’s ability to defend himself shocks the conscience.” *Id.* Noting that vacating its prior judgment under Rule 60(b) returns the case to the procedural posture in which it existed prior to the entry of that judgment, the court vacated its decision to bar reprosecution and imposed the bar. *Id.* at *29.

**For the first time in more than 20 years, Joe
D’Ambrosio is free, and the Supreme Court
declines review.**

59. In light of this order, the state court ordered D’Ambrosio’s release on March 5, 2010, making him a free man for the first time since 1988. The State then appealed this Court’s order barring retrial to the Sixth Circuit and further sought to stay D’Ambrosio’s release pending the appeal. (R. 270: Motion for Stay.) This Court denied the stay request, noting that it did not believe the State showed a likelihood of success for the appeal. (R. 273: Order at 2.) “Put simply,” the court stated, “he is entitled to his freedom.” (*Id.* at 3.)

60. The Sixth Circuit affirmed the district court’s decision to bar any reprosecution of D’Ambrosio, and the Supreme Court declined to review that decision, leaving it intact and final.

61. D’Ambrosio has now been free for approximately two years. He is working three jobs and trying to rebuild the life that was taken from him.

**The particulars of Defendant Leo Allen's *Brady*
violations**

62. Leo Allen was the lead detective on the Klann murder investigation, and he was the only detective to testify at D'Ambrosio's trial.

63. Leo Allen was privy to information and evidence that was exculpatory and favorable to Joe D'Ambrosio's defense, but he concealed such evidence from the defense because such evidence contradicted, discredited, and was inconsistent with statements and testimony of his star witness, Espinoza, as well as the theory of the case propounded by Carmen Marino and the prosecutors. The following are examples of such conduct while Allen was the lead detective:

64. Longenecker called police after learning about the Klann murder to inform them that he believed Klann's death was connected to the rape case, i.e., that Paul "Stoney" Lewis—who had just been released from jail—had a motive to kill Klann and silence him as a witness in the rape case against Lewis. As lead detective, Allen would have been aware of this call. But nobody followed up.

65. Allen knew Lewis made an anonymous phone call to the police asking whether Klann "had his hands cut," information not publicly known. Lewis asked for the location of the Coroner's Office, and Allen was alerted that the person who called with such information would likely be arriving. Allen met with Lewis at the Coroner's Office at which time Lewis—in an attempt to deflect suspicion from himself—provided false and misleading information that Allen knew or would eventually know was impossible, would impeach his star witness, Espinoza, and would damage the prosecution's theory of the case as outlined above.

66. Officers Hayes and Goldstein, and Allen himself, believed the Klann murder did not occur at Doan Creek. Yet Allen never revealed that fact. Allen also possessed or was aware of physical evidence and a trace evidence report that would render his star witness Espinoza's credibility in shambles, such as evidence that no blood was found at the scene; that Klann had no shoes on when he was found; was wearing no underwear; that his wallet was missing; that soil samples taken by Cleveland SIU were negative for blood; that Allen had handwritten notes that bloody clothes were found in Mike Keenan's garage (those were never investigated); that a tape-recorded statement (now missing) of Anthony Crimi revealed another suspect; and that someone in the building where Lewis lived, on Saturday morning before Klann's body was found, heard somebody say "Let's dump the body."

67. Leo Allen also withheld reliable evidence that the crime could not have occurred on Friday night after the events at Coconut Joe's as Espinoza claimed—Tequila night at Coconut Joes was Thursday night, as the bar manager testified and police reports verified (by noting a disturbance there late Thursday night/Friday morning). Leo Allen either withheld this evidence or purposely failed to talk to staff at Coconut Joe's for fear that the true information would destroy his case against Joe D'Ambrosio.

68. Leo Allen, as lead detective, willfully and/or knowingly, failed to follow through on follow up investigation areas that would likely impeach the credibility of his star witness Espinoza, reveal Espinoza's role and/or Lewis's role in the murder, or harm the death-penalty prosecution case against D'Ambrosio. It is further believed, based on differences between the police file and prosecutor's file, that Allen even withheld documents from the prosecutor's office that could be revealed to the defense. His actions proximately caused a miscarriage of justice in the trial and incarceration of D'Ambrosio.

**The particulars of Defendant Elizabeth Balraj's
role in *Brady* violations**

69. Elizabeth Balraj was the elected Cuyahoga County Coroner and testified at D'Ambrosio's trial on matters relating to the cause of death of Anthony Klann as well as the forensic trace-evidence analysis conducted by her office. She held herself out to be an expert and had the final word on these matters on behalf of Cuyahoga County.

70. The forensic findings by her and her office in this case included strong evidence, as stated in more detail above, that the murder of Klann did not occur at the area of Doan Creek, nor that it occurred on the day the prosecution claimed. Further, the physical evidence unambiguously revealed (supported by Elizabeth Balraj's trace-evidence report) that such evidence was exculpatory.

71. Despite her knowledge of the trace evidence—inconsistent with the theory of the case pursued by the prosecutors and Leo Allen—Elizabeth Balraj concealed or withheld the production of this exculpatory trace evidence from the defense in an effort to mold her conclusions to fit the prosecution's theory of the case. The withheld trace-evidence documents showed, for example, that Klann had no shoes on and no underwear on—establishing that, contrary to Espinoza's story—Klann was not picked up while walking along the street in the rain and then taken to Doan creek to be killed.

72. Elizabeth Balraj signed the official Coroner's Verdict endorsing the Espinoza version of events and other misleading conclusions propounded by Leo Allen and the prosecutors that were at odds with the forensic findings.

73. As the Coroner, Elizabeth Balraj had a duty and responsibility to seek justice and protect the innocent, to follow high standards of integrity and competency in matters related to forensic analysis. Furthermore, as Coroner, she worked closely with detectives and prosecutors and received reports of their investigation—reports that she knew or should have known were inconsistent with her conclusions and testimony.

74. Elizabeth Balraj's acts or omissions contributed to an unfair trial based on a misleading, dishonest, and discredited prosecution theory, especially given her critical and collaborative relationship with the police and prosecutors in connection with the Klann investigation as well as her role as a prosecution witness.

**The pattern and policy of violations by the
Prosecutor's Office**

75. In this Court's 2006 Brady Opinion, the Court noted that Marino had a policy of not allowing defense attorneys to copy relevant documents regarding the case, including police reports. 2006 Brady Op. 15 ("[P]ursuant to Marino's policy, DeFranco was not permitted to copy any police reports."). That policy was employed in this case, and D'Ambrosio's trial attorney was left to take notes on whatever Marino decided to orally relay about the file. *Id.*

76. This Court has also explained that in 2009 another prosecutor testified to a similarly limited view of the *Brady* obligations in the Prosecutor's Office, even where defense counsel had requested evidence be turned over: "Specifically, Mahoney explained his belief that the State had no obligation to search for or produce physical, tangible items of evidence unless and until defense counsel orally requested the production of specific items, or sought review of items housed at specific locations." 2009 Unconditional Writ Op. at 14–15. "When pressed on

whether it was his view that D'Ambrosio's two written requests for the production of all tangible items in the State's possession were insufficient to trigger the State's obligations to produce the blood and soil samples, Mahoney said yes." *Id.* at 15.

77. This prosecutor also testified that what occurred in this case is the procedure that happens in all cases for the Prosecutor's Office: "I have handled this case no different from any other case that I have prosecuted." (4-1-09 Tr. at 88.)

78. This Court further explained that the Sixth Circuit has noted the "shameful" record of Defendant Marino, including his misconduct at D'Ambrosio's trial:

. . . Carmen Marino[] has a shameful track record of breaking rules to win convictions. See *State v. Liberatore*, 69 Ohio St. 2d 583, 433 N.E.2d 561 (1982)("the prosecutorial blunders in this case are too extensive to be excused."); *State v. Owensby*, 1985 Ohio App. LEXIS 7351, 1985 WL 8623, *3 (1985)("prosecutor's comments clearly outside the bounds of mere earnestness and vigor[.]"); *State v. Heinisch*, 1988 Ohio App. LEXIS 3644, 1988 WL 236144, *19 (1988)("Clearly the prosecutor improperly commented on excluded evidence."); *State v. Harris*, 1990 Ohio App. LEXIS 5451 (1990)(prosecutorial misconduct found, but harmless); *State v. Hedrick*, 1990 Ohio App. LEXIS 5647 (1990) (prosecutorial misconduct by making improper comments on matters outside of record and on defendant's failure to testify.); *State v. Durr*, 58 Ohio St. 3d 86, 568 N.E.2d 674 (1991)(improper comments on the appellant's unsworn statement, the appellant's prior convictions, and mitigating factors held harmless.); *State v. Keenan*, 66 Ohio St. 3d 402, 613 N.E.2d 203 (1993)(presenting an "aggravated example" of prosecutorial misconduct); *State v. D'Ambrosio*, 67 Ohio St. 3d 185, 1993 Ohio 170, 616 N.E.2d 909 (1993)(prosecutorial misconduct found, but either waived or harmless); *State v. Johnson*, 1992 Ohio App. LEXIS 4256, *17 (1993) (prosecutorial misconduct "[rose] to the level of being constitutional errors."); *State v. Matthews*, 1999 Ohio App. LEXIS 896, 1999 WL 135264, *2 (1999)(prosecutor denied making a deal with witnesses, however, "there is ample evidence to suggest that [the witness] at least did in fact receive just what the assistant county prosecutor said he would not give him."); *State v. Larkins*, 2003 Ohio 5928, 2003 WL 22510579 (Ohio Ct. App. Nov. 6, 2003)(affirming grant of new trial upon

finding that Marino withheld eyewitness descriptions not matching Larkin; hid a deal he struck to obtain the testimony of the only claimed eyewitness; then stood silent as she lied about the deal and her criminal record during trial).

*69 n.18 (citing *Lott v. Coyle*, 366 F.3d 431, 433 n.1 (6th Cir. 2004)).

79. In light of the suffering D'Ambrosio has endured for more than 20 years at the hands of the Defendants, he brings the various claims below.

COUNT ONE

42 U.S.C. § 1983 claim against Marino and Mason in their official capacity and against Cuyahoga County (under *Monell*) for withholding exculpatory evidence.

80. All of the foregoing paragraphs are incorporated by reference and realleged as though fully set forth here.

81. Defendants Marino and Mason failed to disclose exculpatory evidence to D'Ambrosio before, during, and after his trial. The concealed exculpatory evidence was material, and the failure to turn over the evidence gave rise to constitutional violations of D'Ambrosio's rights under *Brady v. Maryland* and the Fourteenth Amendment to the United States Constitution.

82. Through their direct actions and decisions as the final and official policymakers for the Prosecutor's Office and Cuyahoga County as the political entity, Defendants Marino and Mason intentionally, maliciously, and with reckless disregard for and deliberate indifference to D'Ambrosio's rights, either participated in the withholding of the exculpatory evidence and/or created and maintained an official policy, practice, and/or custom of ordering and compelling other prosecutors in the office to proceed with and maintain the investigation and prosecution of

D'Ambrosio without concern for his constitutional rights. *See generally Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978).

83. In addition, or in the alternative, Defendants Marino and Mason, acting in their final policymaking authority and under color of law, created and maintained an official policy, practice, and/or custom of failing to adequately train, monitor, and supervise the employees of the Prosecutor's Office regarding the constitutional duty to disclose exculpatory evidence to the defense, despite the obviousness that such training, monitoring, or supervision was required to prevent constitutional violations.

84. The general practice of withholding exculpatory evidence, even if not authorized by officially adopted or promulgated policy, was so common and well settled as to constitute an official policy that fairly represented the Prosecutor's Office's official custom, policy, and/or practice.

85. Through their direct actions and decisions as final and official policymakers for the Prosecutor's Office, Defendants Marino and Mason intentionally, maliciously, and with reckless disregard for and deliberate indifference to D'Ambrosio's rights, participated in the withholding of the exculpatory evidence.

86. Defendants Marino and Mason's actions and the official policy, practice, and/or custom of Cuyahoga County resulted directly in the constitutionally deficient investigation and prosecution of D'Ambrosio and abridged his rights guaranteed under the Fourth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

87. In this case, the official policy, practice, and/or custom resulted in the *Brady* violations and concealment and destruction of exculpatory evidence.

88. The official policy, practice, and/or custom of the prosecutor's office on behalf of Cuyahoga County in concealing exculpatory evidence and maliciously prosecuting individuals, without regard to guilt or innocence, proximately and directly caused D'Ambrosio injury, including great distress, physical pain, anguish, fear, suffering, loss of companionship, and monetary damages.

89. As a successor in office and liability to Defendant Marino, Defendant Mason is liable in his official capacity for the damages caused by the failures to disclose exculpatory evidence in violations of D'Ambrosio's constitutional rights.

COUNT TWO

42 U.S.C. § 1983 claim against Leo Allen in his individual and official capacity and against the City of Cleveland (under *Monell*) for withholding exculpatory evidence.

90. All of the foregoing paragraphs are incorporated by reference and realleged as though fully set forth here.

91. Defendant Leo Allen failed to disclose exculpatory evidence to D'Ambrosio prior to, during, and after his trial. The concealed exculpatory evidence was material, and the failure to turn over the evidence gave rise to constitutional violations of D'Ambrosio's rights under *Brady v. Maryland*, and the Fourteenth Amendment to the United States Constitution.

92. Furthermore, Leo Allen was a policymaker, on behalf of himself and the City of Cleveland. The decisions he made in connection with the aforementioned Brady violations were final, and not reviewable by any other higher authority within the police department. He reported to no one and, as far as the investigative decisions made in this case, as well as others, his decision was final as to what was disclosed or not disclosed to the defense.

COUNT THREE

42 U.S.C. § 1983 claim against Elizabeth Balraj in her individual and official capacity and against Cuyahoga County (under *Monell*) for withholding exculpatory evidence.

93. All of the foregoing paragraphs are incorporated by reference and realleged as though fully set forth here.

94. Defendant Elizabeth Balraj, on behalf of herself as well as the County of Cuyahoga, failed to disclose exculpatory evidence to D'Ambrosio before, during, and after his trial. The concealed exculpatory evidence was material, and the failure to turn over the evidence gave rise to constitutional violations of D'Ambrosio's rights under *Brady v. Maryland* and the Fourteenth Amendment to the United States Constitution.

95. As a policymaker on behalf of Cuyahoga County, in her official capacity, Elizabeth Blaraj's constitutional violations constituted policy, custom or practice of Cuyahoga County as a governmental entity. She was the elected coroner and made final decisions within her agency. Her decisions with respect to individual cases, such as the instant case, were final and not subject to review.

COUNT FOUR

Ohio Revised Code § 2744.03 claim against Leo Allen and Elizabeth Balraj

96. All of the foregoing paragraphs are incorporated by reference and realleged as though fully set forth here.

97. The conduct of Defendants Leo Allen and Elizabeth Balraj constituted acts or omissions committed with malicious purpose, in bad faith, or in a wanton or reckless manner and

deprived D'Ambrosio of a fair trial. These acts or omissions were a proximate cause of his wrongful imprisonment.

DAMAGES

98. The actions of Defendants, jointly and severally, deprived D'Ambrosio of his constitutional and civil rights guaranteed under the U.S. Constitution.

99. As a direct and proximate cause of Defendants' acts, D'Ambrosio served more than 20 years in prison and was nearly executed.

100. D'Ambrosio suffered loss of job training, employment, and wages during his incarceration.

101. D'Ambrosio lost the friendship and companionship of others, including his family.

102. D'Ambrosio has suffered mental and psychological stress as a result of being publicly and falsely prosecuted for murder, and as a result of a reasonable fear that he would be executed for a murder he did not commit.

103. As a direct and proximate result of Defendants' acts, D'Ambrosio suffered damages and injuries for which he is entitled to compensatory damages in an amount to be determined at trial.

104. Defendants' acts were intentional, malicious, deliberate, reckless, wanton, and/or cruel, such as to justify and award of punitive damages to D'Ambrosio.

105. D'Ambrosio furthermore suffered other injuries set forth in the other paragraphs of this Complaint.

PRAYER FOR RELIEF

Accordingly, D'Ambrosio requests as follows:

- A. That the Court award compensatory damages to him and against the defendants, jointly and severally, in an amount greater than \$1 million, to be determined at trial;
- B. That the Court award punitive damages to him, and against all non-municipal individual defendants, in an amount to be determined at trial that will deter such conduct by defendants in the future;
- C. For a trial by jury;
- D. For pre-judgment and post-judgment interest and recovery of his costs, including reasonable attorneys' fees under 42 U.S.C. § 1988 for all 42 U.S.C. § 1983 claims and costs under 42 U.S.C. § 1920; and
- E. For any and all other relief to which he may be entitled.

Dated: March 1, 2012

Respectfully submitted,

/s/ David E. Mills

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